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No. 91-453

IN THE

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

against

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Brief *Amicus Curiae* of Fire Island Association in Support of Petitioner

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Interest of *Amicus Curiae*[1] and Summary of the Argument

The Fire Island Association, Inc. (FIA), a not for profit corporation, is a league of seventeen property owner associations that collectively represent approximately 3,800 owners

[1]Letters from both parties consenting to the filing of this brief are being filed with the Clerk of the Court together with the brief.

of private property within the boundaries of the Fire Island National Seashore. The presidents of the community associations comprise the board of directors of FIA, but there is no formal relationship between FIA and the community associations. In addition to its member associations, there are 1,235 paid individual members of FIA for the 1991-92 fiscal year. These individual members are owners of residences or of vacant land located on the Fire Island barrier island and mainly situated there in primary or secondary dunes. Most of the members' residences or vacant land were respectively built or subdivided into lots conforming to municipal zoning codes before July 27, 1981, the effective date of New York's Environmental Conservation Law (McKinney's Consolidated Laws, Book 17 1/2, Article 34). As authorized by that Article, the New York State Department of Environmental Conservation has promulgated Coastal Erosion Management Regulations (6 NYCRR, Part 505), which proscribe all development of the primary dune and nearshore area (Regs. 505.8[a][2] and [d][5]) without a coastal erosion management permit, and the restoration of any existing structure damaged or destroyed by coastal flooding and erosion, the cost of which equals or exceeds 50 percent of the estimated full replacement cost of the structure at the time of restoration, without such a permit (Reg. 505-2[jj], 505.8[b][4]; 505.8[d][7]).

The decision of The South Carolina Supreme Court held that State's Beachfront Management Act constitutional notwithstanding its prohibition against development of Lucas' property. It did so on the basis of public nuisance caselaw, without analysis of the South Carolina Act in relation to that law, and notwithstanding that under that Act the only structure that could be erected on Lucas' lots was a small deck or walkway and the only use to which they could be put was recreational. If that decision is affirmed by this Court, the rights of Fire Island Association members in relation to the grant of a permit under Article 34 of New York's Environmental Conservation Law will be materially and adversely affected.[2]

In what follows, therefore, *amicus* argues in support of petitioner that the South Carolina court reached its nuisance conclusion without analysis of the Act and thus improperly applied this Court's caselaw which held noncompensable a statute the direct effect and purpose of which was to proscribe conduct constituting a public nuisance.

Amicus argues further that the Beachfront Management Act is not a zoning ordinance to which rational basis scrutiny applies, but rather in prohibiting all use other than recreational is an enactment to which intermediate scrutiny should be applied, and when so reviewed should be held to constitute a taking requiring the payment of compensation.

ARGUMENT

POINT I

The Beachfront Management Act is not a public nuisance enactment.

The South Carolina Supreme Court held that "when a State merely regulates use, and acts to prevent a serious public *harm*, there is no 'taking' for which compensation is due," 404 S.E.2d 895, 900 (emphasis in original). It supported that holding by referring to prior decisions of this Court, as follows (404 S.E.2d at 898):

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[2]The importance of the issues not only to the members of *amicus* but also to many other property owners in coastal areas is indicated by the Hearings Before The Subcommittee on Policy Research & Insurance of the Committee on Banking, Finance and Urban Affairs of the House of Representatives (July 13, 1990, Serial No. 101-150), which at pages 188-215 details beachfront management programs in eighteen states and territories in addition to South Carolina and New York.

"See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (prohibition on the manufacture and sale of intoxicating liquors); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (ordinance prohibiting the manufacture of bricks near residents in Los Angeles); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (state action destroying diseased cedar trees of certain property owners to prevent the infection of apple orchards); and *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (prohibition against excavating below the water table in order to extract gravel).

But in each of those cases the enactment which had been passed under the police power had a direct and substantial relation to the public's health, safety or welfare, and/or upon the private interests of other property owners affected by the nuisance-like condition. Thus, in *Hadacheck* the court noted (239 U.S. at 408) the allegation by the defense that fumes, gases, smoke, soot, steam and dust from the brick manufacturing plant had caused sickness and serious discomfort to those living in the vicinity; in *Miller* it contrasted the public concern in the preservation of the apple growers' interests with the lesser interest of the owners of the diseased cedar trees who would still be permitted to use or sell the wood of those trees; in *Goldblatt* the property owner had failed to show that there was no, or only a *de minimus*, effect on public safety (369 U.S. at 595) and in *Mugler* the direct relation of prohibiting manufacture of intoxicants on public health, safety and welfare was clear.

In the *Lucas* case there is no such direct relationship to the health, safety or welfare of the public or of the owners of other property on the Isle of Palms. True, Section 1, paragraph a of the Beachfront Management Act lists as one of the functions served by the Act that it protects life and property by serving

as a storm barrier, but that is a generalization[3], unlike the direct nexus between disease which infected the red cedars in *Miller* and the apple orchards that would be destroyed by that disease if the infected red cedars were not first destroyed. Moreover, the remaining functions listed in Section 1, paragraph a (provides a basis for tourism, provides a habitat for plants and animals, provides a natural health environment for citizens of South Carolina to spend leisure time) all involve *enhancement* of the rights of *others* rather than the *protection* of health, safety and welfare against the direct effects of the activity enjoined. Thus, as noted in Justice Harwell's dissent—"the Beachfront Management Act does not have as its *primary* purpose the prevention of a nuisance and is therefore not subject to the *Mugler* analysis" (404 S.E.2d at p. 906; emphasis in original).

Finally to be noted on this point is that while the court below held that Lucas' failure to attack the legislature's "findings" that new construction would cause serious public harm amounted to a concession that the *Mugler* "nuisance-like exception" applied (404 S.E.2d at 900), it never itself articulated why erection of houses on the Lucas lots could properly be considered a nuisance by reason of location alone, or how location related to erosion in order to constitute such buildings a public nuisance. Thus, it appears open to serious question that the South Carolina legislature deemed beachfront development a public nuisance.

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[3]It is, moreover, a generalization called into serious question by Chapter 6 of the Hearings referred to in footnote 2 above which states that the problem of beach changes "is indeed inherently chaotic" (p. 524; see also p. 526 ("lack of functional relationships"), that "a set relationship at one place may not be valid elsewhere"(p. 529) and that "to improve the methodology for assessing beach erosion and the risk of collapse of structures, much more research needs to be undertaken" (p. 531).

POINT II

The Beachfront Management Act should be subjected to intermediate scrutiny and when so reviewed constitutes a taking requiring payment of compensation.

For the South Carolina Supreme Court it was enough "that Lucas does not challenge the fact that the legislation here is necessary to prevent serious injury to the community" (404 S.E.2d at p. 901), see also its reference to "Lucas' *de facto* concession of the validity of the legislative scheme and its purposes" (404 S.E.2d at 902). In so doing it was in effect applying rational basis scrutiny rather than intermediate scrutiny, which would have required it to consider not only whether the statutory scheme served important governmental objectives, but also whether it was substantially related to achievement of those objectives, *Fullilove v. Klutznick*, 448 U.S. 448, 519; *Craig v. Boren*, 429 U.S. 190, 197.

Yet as Professor Richard Epstein notes in Takings—Private Property and the Power of Eminent Domain (1985), p. 128:

> "The question of overbreadth and underbreadth so critical to the constitutional inquiry necessarily imitates the task of balancing hardships that has long been the byword of responsible courts of equity. To look only at the risks the state prevents is to ignore those it has increased. As matters of estimate replace matters of principle, some judicial deference is required. The number of factors that bear on the question of just compensation is large, and they are not uniquely ordered. Any complete inquiry must look not only at the statute itself, but at the uneasy mix of legislative competence and legislative bias, all in an effort to assess whether the remedy chosen fits the evil to be avoided. The task invites difficult marginal cases, for

> minimizing error does not eliminate it when the subject matter is so diffuse and amorphous. Nonetheless, even after allowances are made for the inherent difficulty of the inquiry, the Supreme Court, here as elsewhere, has set its thumb too heavily on the side of state power. In this area too the rational basis test precludes any serious review of the fit between means and ends. What is needed is an intermediate standard of review that says, as did the court in *Lochner*, "The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate.[4]

Epstein argues, therefore, that "intermediate scrutiny is still clearly appropriate in the eminent domain area" (*id*, p.137).[5]

We urge this Court in reversing the South Carolina Supreme Court's decision to make clear that on remand the level of scrutiny should be intermediate rather than rational basis. If intermediate scrutiny is applied, the existence of serious harm alone is not enough, for as Justice Harwell, dissenting below, noted this Court's decision in *Keystone Bituminou Coal Association v. Debenedictis*, 480 U.S. 470, "does not hold that every exercise of the police power can escape the Constitution by calling that which it seeks to prevent a nuisance. Such an interpretation would totally eviscerate the takings clause" (404 S.E.2d at 905). Here, as argued in Point I above, the relation between means and the end sought to be achieved is at best tenuous, as the Court below should have found had it gone beyond its "finding" of serious public harm.

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[4]*Lochner v. New York*, 198 U.S. 45, 57.

[5]See also in this connection footnote 3 to the majority opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 and the text of the opinion to which it relates.

To determine whether there has been a regulatory taking of the Lucas property required the court below not only to consider the means-ends relationship, but also "to compare the value that has been taken from the property with the value that remains in the property", *Keystone, supra,* 480 U.S. at 497. Although such a comparison is "by no means conclusive", *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594, "if regulation goes too far it will be recognized as a taking", *Pennsylvania Coal v. Mahon,* 260 U.S. 393, 415. In *Andrus v. Allard,* 444 U.S. 51, such a comparison resulted in a holding that there had been no compensable taking by reason of regulations prohibiting the purchase or sale of pre-existing avian artifacts where the owners retained "the right to possess and transport their property, and to donate or devise the protected birds" (444 U.S. at 66) and to "exhibit the artifacts for an admissions charge" (*id*). The situation here is, however, completely different. As found by the trial Judge Lucas' "reasonable investment backed expectations" (*Keystone, supra,* 480 U.S. at 495), when on December 3, 1986 he purchased the two lots in question for $975, 000 were that he could build a single family residence on each lot and there were, at that time, no restrictions that would have prevented his doing so. As the South Carolina Supreme Court recognized, however, "the [Beachfront Management] Act prohibits, through statutorily mandated setback lines, the construction of any permanent structure (including a dwelling), save a stall deck or walkway." (404 S.E.2d at 896). It is important to note that what is here involved is not the normal setback line which is regularly included in zoning ordinances, for such setback lines define the area within which development will be permitted, whereas the setback lines provided for in The Beachfront Management Act exclude development altogether, save for a small deck or walkway. Thus, if the Act is held not to constitute a taking, Lucas has paid $975,000 for land which he can use only in a transitory fashion and only for recreational purposes, and which, despite the Council's argument to the contrary, would be saleable to adjacent owners, if at all, only at a very small

fraction of the $975,000 which Lucas invested in the lots in the reasonable expectation that they could be developed as residences. Clearly, therefore, within this Court's decisions recognizing that a regulation which "denies an owner economically viable use of his land" (e.g.—*Keystone, supra,* 480 U.S. at 485), there has been a taking.

Conclusion.

Because review of The Beachfront Management Act should have been by intermediate scrutiny, because the relation between the means used to attain the ends sought to be achieved by that Act are much more questionable than any previously upheld by this Court, and because the statute has all but obliterated[6] the value of the Lucas property and Lucas' reasonable investment backed expectations when he bought the lots, the decision of the South Carolina Supreme Court should be reversed and the matter remanded for further proceedings under the proper standard.

Respectfully submitted,

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[6]Indeed, Justice Harwell's dissent states that Lucas' appraiser fixed the present value of the lots as zero, 404 S.E.2d at 907 and that the Council's expert was unable to explain how he arrived at the conclusion that it had some value (*id*).

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